Supreme Court, U. S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1379

EDMUND J. GODIN,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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Supreme Court of the United States.

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No. .

EDMUND J. GODIN,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

The petitioner, Edmund J. Godin, prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts entered December 29, 1977.

Opinion Below.

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is reported as *Commonwealth* v. *Godin*, ____ Mass. ____, 371 N.E. 2d 438 (1977) (Mass. Adv. Sh. [1977] 2790), and is reprinted as Appendix B to this petition at pp. 9a-21a.

Jurisdiction.

The judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts was entered on December 29, 1977, and is reprinted as Appendix C to this petition at p. 22a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented.

1. Whether the application in petitioner's criminal trial of the common law duty of an employer to his employees alleged in the indictments, first enunciated by the trial judge in his instructions to the jury and first approved by the Supreme Judicial Court upon petitioner's appeal from his conviction for manslaughter, violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that it constituted a retroactive and unforeseeable application of the criminal law?

2. Whether petitioner was convicted on no evidence that he had stored an excessive or illegal quantity of fireworks, as alleged in the Commonwealth's bill of particulars,

in violation of his rights under the Due Process Clause of the Fourteenth Amendment?

Constitutional Provision Involved.

Constitution of the United States, Amendment XIV:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ..

Statement of the Case.

Petitioner seeks a writ of certiorari to review the judgment of the Massachusetts Supreme Judicial Court, entered December 29, 1977, affirming his conviction on three indictments for manslaughter. Petitioner was convicted on July 2, 1975, after a jury trial in the Superior Court, and the Supreme Judicial Court granted direct appellate review.

The case arises out of an explosion on March 30, 1972, on the premises of Pyro Products, Inc., a Massachusetts corporation engaged in the manufacturing of fireworks. The indictments charged petitioner, as president of the corporation, with wantonly and recklessly breaching his legal duty to the employees of the corporation to use reasonable care to keep the premises safe for their use in their employment (R. 2-4).[1] In response to petitioner's motion for a bill of

[1] References to (R.) and (S.R.) are to the printed Summary of the Record and Supplementary Record of the proceedings in the trial court.

particulars, the Commonwealth specified that the petitioner breached his duty by "[t]he storage of fireworks in excessive and illegal amounts" (S.R. 3, 8, 13).

Petitioner moved to dismiss the indictments on the grounds that they did not specify a crime under then existing law, in that there was no such legal duty established by the law of Massachusetts, and that they failed to comply with the specificity requirements of the Due Process Clause of the Fourteenth Amendment (R. 5, 6). This motion was denied and petitioner's exception preserved (App. A, *infra*, pp. 1a-2a).

At trial, the petitioner and the Commonwealth stipulated that petitioner was the President of Pyro Products, Inc., on March 30, 1972; that the three decedents died as a result of the explosion on that date; and that Pyro Products, Inc., was duly licensed under both local and state laws and had all the necessary bonding and permits required by law to operate a fireworks manufacturing company.

Evidence was introduced to show that unfinished fireworks had accumulated in one building of the manufacturing plant due to a strike, that although the building had always been used for storage, the additional quantity made the work of the employees more difficult, and that petitioner had been warned of the danger possibly resulting from this condition.

The trial judge expressly found that there was no evidence that this storage violated any applicable ordinance or regulation (Tr. 237),[1] and there was no evidence that the quantity was excessive by any custom in the business or like practice in the industry from which the jury could find a standard of care.

[1] References to (Tr.) are to pages of the transcript of the proceedings at trial.

At the close of the Commonwealth's case and at the close of all the evidence, petitioner moved for directed verdicts of not guilty on the ground that no evidence had been introduced of any standard by which his storage of fireworks was excessive or illegal. Exceptions to the denials of his motions were preserved (R. 6-7) (App. A, *infra*, pp. 2a-3a).

The judge instructed the jury that petitioner could be found guilty of manslaughter if he had not acted in such a way as to keep the risks to his employees at a reasonable minimum, consistent with the operation of a business of this type (Tr. 299). The petitioner objected to these instructions on the ground that they imposed a more stringent standard of care on an employer than had previously been imposed under Massachusetts law, thus retroactively imposing liability on conduct which was not criminal when engaged in. Petitioner excepted both to the failure to give requested instructions and to the instructions as given, claiming that they violated his due process rights under the Fourteenth Amendment to the United States Constitution (R. 19-21).

After the guilty verdict, petitioner's motion for a new trial was denied (R. 11) (App. A, *infra*, pp. 3a-4a). He filed a timely claim for appeal, and applied to the Supreme Judicial Court for direct appellate review. This application was granted. Both in his application, in his brief, and in oral argument, petitioner pressed his claim that the failure to dismiss the indictments and the trial judge's instructions as given violated his due process rights under the Fourteenth Amendment on the grounds that the duty of care stated in the indictments and in the judge's charge had been unforeseeably and retroactively applied. *Commonwealth* v. *Godin*, *supra*, at 2794-2795, 2802 (App. B, *infra*, pp. 12a-13a, 19a). Petitioner also preserved and pressed on appeal his claim that there was no evidence from which the jury

could have found that his storage of fireworks was excessive or illegal (R. 18-19). *Id.* at 2799 (*id.*, pp. 16a-17a).

The Supreme Judicial Court rejected the petitioner's contentions on both of these due process claims. *Commonwealth* v. *Godin, supra.*

Reasons for Granting the Writ.

I. THE APPLICATION TO PETITIONER OF THE COMMON LAW DUTY OF AN EMPLOYER TO HIS EMPLOYEES ALLEGED IN THE INDICTMENTS, FIRST ENUNCIATED BY THE TRIAL JUDGE IN HIS INSTRUCTIONS TO THE JURY AND FIRST APPROVED BY THE SUPREME JUDICIAL COURT UPON PETITIONER'S APPEAL FROM HIS CONVICTIONS FOR MANSLAUGHTER, VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT IT CONSTITUTED A RETROACTIVE AND UNFORESEEABLE APPLICATION OF THE CRIMINAL LAW.

Petitioner contends that the Supreme Judicial Court of Massachusetts and the trial court acted in disregard of his rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and in conflict with the principle announced by this court in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), and *Douglas* v. *Buder*, 412 U.S. 430 (1973), by establishing and applying in this criminal case a duty of care owed by employers to employees which has never before been stated or held to be the applicable duty.

In Massachusetts the elements of the crime of manslaughter are derived from the common law. *Commonwealth* v. *Godin, supra*, at 2796 (*infra*, p. 14a). One of those elements is the legal duty of care which the defendant owed to the decedent. *Commonwealth* v. *Welansky*, 316 Mass. 383, 399 (1944); *Commonwealth* v. *Godin, supra*, at 2795-2798 (*infra*, pp. 13a-16a). The duty owed is a material element of the offense because the jury must determine whether a defendant's conduct deviated so far from the duty owed as to constitute wanton and reckless conduct. "The essence of wanton or reckless conduct is intentional conduct, by way either of commission or of omission *where there is a duty to act* . . .." *Commonwealth* v. *Welansky, supra*, at 399. (Emphasis supplied.)

The indictments charged that Pyro Products, Inc., "was under a legal duty to its employees to use reasonable care to keep its premises safe for their use in their employment" and that the petitioner, being "authorized by the corporation to maintain, control, operate, construct, alter, supervise and manage its premises," accepted the responsibility for such acts and "was therefore under a duty to its employees to use such reasonable care," but in reckless disregard of such duty and in reckless disregard of the possible harmful consequences to such employees of his failure to perform said duty, he "did wilfully, wantonly and recklessly neglect and fail to fulfil his duty" (R. 2-4).

The denial of petitioner's motion to dismiss the indictments was upheld by the Supreme Judicial Court on the ground that the indictments correctly charged the duty of care owed, *Commonwealth* v. *Godin, supra*, at 2794-2798 (*infra*, pp. 12a-16a), and that it had never been stated in Massachusetts that a lesser duty was owed. *Id.* at 2798 (*infra*, p. 16a).

The trial judge instructed the jury in accordance with the duty alleged in the indictments.[3] The Supreme Judicial

[3] The Supreme Judicial Court held that a variation between the duty alleged and the duty charged was not prejudicial when the charge was

Court held that, since the duty alleged in the indictments correctly stated applicable law, the instructions were correct. *Id.* at 2802 (*infra*, p. 19a).

Petitioner claims that under a fair reading of prior Massachusetts case law, he could not have anticipated that an employer could be found criminally liable for failure to exercise reasonable care. Indeed, twelve days after its decision in petitioner's case, the Supreme Judicial Court stated the duty of care of employers to employees in the following language:

> The tort duty of care owed by an employer to his employee . . . is stated in terms of an exception — only where there is a hidden defect or danger does a duty of care exist at all. The general rule is that the employer owes no duty to alter the condition of his premises to make them safe for the employee. *Poirer* v. *Town of Plymouth*, ____ Mass. ____ (1978) (Mass. Adv. Sh. [1978] 100, 116-117), citing *Burr* v. *Massachusetts Elec. Co.*, 356 Mass. 144, 147 (1969), and *Williams* v. *United Men's Shop, Inc.*, 317 Mass. 319, 320 (1944).[4]

Prior Massachusetts cases uniformly hold that an employer had no duty to employees to use reasonable care to keep its premises safe for their use in their employment. In *Shannon* v. *Willard*, 201 Mass. 377, 380 (1909), the court held

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read as a whole. *Commonwealth* v. *Godin*, *supra*, at 2803 (*infra*, p. 20a).

[4] The court then abandoned this previously applicable duty of care in favor of imposing a duty to exercise reasonable care, on the ground that the public policy of the Commonwealth now justifies such a change. *Id.* at 127.

that under the common law an employer is under no duty to his employees to change the obvious conditions of a building in which the employee accepts employment. *See also, Burr* v. *Massachusetts Elec. Co.*, 356 Mass. 144, 147 (1969), where the court stated that an employer owes no duty to alter the conditions where the work is to be done or to make them safe for the employee. *Accord, Sparks* v. *Kepnes*, 339 Mass. 349, 351-352 (1959); *Williams* v. *United Men's Shop, Inc.*, 317 Mass. 319, 320 (1977).

In presenting his claims to the Supreme Judicial Court, the petitioner relied upon these prior statements of the duty of care, the accuracy of which is affirmed by the decision in *Poirier* v. *Town of Plymouth, supra.* Although the Supreme Judicial Court distinguished between the civil and criminal duties of care in both *Commonwealth* v. *Godin, supra*, at 2797-2798 (*infra*, pp. 15a-16a), and *Poirier* v. *Town of Plymouth, supra*, at 116, by referring to the "tort" duty of care, those two cases constitute the first two instances in which a Massachusetts court has ever characterized the duty of care of an employer to its employees as being a "tort" duty or a "criminal" duty.

The unforeseeability of the duty imposed on petitioner is further demonstrated by *Commonwealth* v. *Welansky, supra*, the only manslaughter case in the decisions of courts of Massachusetts referring to the duty of care of an employer to his employees. In that case, the Supreme Judicial Court contrasted an employer's common law duty of care to his employees with a businessman's duty of care to his invitees. The court sustained indictments which charged that a businessman owed a duty to exercise reasonable care for the safety of his invitees. It directly contrasted the duty of care which an employer owes to his employees in the following language:

> Compare the case of an employer who at common law owes no duty to his employees to make his factory safer than it appeared to be when the employment began, because they contractually assumed the risk. [Citations omitted.] 316 Mass. at 397 n. 2.

This decision supports petitioner's argument in several respects. First, in defining a businessman's duty of care to his invitees, the Supreme Judicial Court relied upon and incorporated the legal duty of care as it had been stated in civil cases. *See* 316 Mass. at 397. This gives rise to an expectation that the legal duty of care does not vary between civil and criminal cases. Second, the court contrasted an employer's duty of care to his employees with a businessman's duty of reasonable care to his invitees, indicating that the employer owes a lesser duty. This statement, made in a criminal case, also implies that the criminal duty of care is determined by reference to the civil standard. If a Massachusetts employer in 1944 did owe a duty to use reasonable care for the safety of his employees, it is unfathomable why the court would contrast the tort duty of care rather than compare the criminal duty of care. Third, while the Supreme Judicial Court stated in petitioner's case that the *Welansky* footnote must be viewed as *obiter dictum* with no force of precedent, *id.* at 2797-2798 (*infra*, p. 15a), it must be recognized that that is the *only* statement of an employer's duty of care which has ever been made by the Supreme Judicial Court in the context of a criminal case. Thus, *Welansky*, *supra*, gave petitioner and other employers every reason to believe that the duty established in the civil law would apply in the criminal context as well.

No rebuttal of petitioner's argument appears in the opinion of the Supreme Judicial Court. The court cited no

criminal case as authority for its holding that an employer does owe a duty of reasonable care for the safety of his employees. Nor did the court cite any civil or criminal case which distinguished between the duty of care applicable in civil and criminal cases in the context of the employer/employee relationship.[5]

Perhaps to compensate for this lack of precedent, the court below stated that because the doctrine of assumption of the risk is not applicable in criminal cases, the *Welansky* footnote is *obiter dictum*. *Commonwealth* v. *Godin*, *supra*, at 2797 (*infra*, at 15a). However, assumption of the risk, whether voluntary or contractual, has never been stated to be a part of the legal duty of care. Doctrines such as assumption of the risk are affirmative defenses and have consistently been recognized as such in civil and criminal cases. They do not alter the legal duty which is owed. They merely establish the basis for a defendant's avoidance of liability where he has breached the duty — the avoidance being allowed by law because the injured party has assumed the risk.

Although the rule that an employer has no duty to his employees to change the obvious conditions of their employment is sometimes called a contractual assumption of the risk, that description confuses two separate concepts and is probably inaccurate. *See Lakube* v. *Cohen*, 304 Mass. 156 (1939). The level of duty owed by an employer to his employees is established for reasons of public policy and cannot normally be altered by the parties. The case of *Commonwealth* v. *Atencio*, 345 Mass. 627 (1963), cited in the prin-

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[5] The court acknowledged in the principal decision the recent reformulation of duties of care applicable in other contexts not involving an employer. *Commonwealth* v. *Godin*, *supra*, at 2797 n. 2 (*infra*, p. 15a n. 2). All these cases have been decided since 1972.

cipal decision for the correct proposition that doctrines such as contractual assumption of risk have no place in the criminal law, firmly establishes the difference between the duty of care, which is a part of the Commonwealth's case, and assumption of the risk, an affirmative defense in civil cases. Thus, in *Poirier*, *supra*, when the Supreme Judicial Court raised the employer's duty of care, it did not do so by means of abolishing the defense of assumption of the risk. In *Commonwealth* v. *Atencio*, *supra*, what the court disallowed was the defendant's offer of an affirmative defense that the decedent had assumed the risk; it did so not because a higher duty was involved, but because that defense has no place in the criminal law. Petitioner did not suggest or attempt to prove that the decedents assumed any risk. He simply asserted and continues to assert that the duty of care established in prior cases was a lesser one than that which was stated and applied to his conduct.

Petitioner does not challenge the power of the Supreme Judicial Court to reinterpret common law doctrines, whether they be the duty owed by an employer to an employee or the common law elements of the crime of manslaughter. In a criminal case, however, the Due Process Clause and the principles of *Bouie* v. *City of Columbia*, *supra*, and *Douglas* v. *Buder*, *supra*, require that the court limit its redefinition of the law to prospective application. The imposition upon the petitioner of a duty of care heretofore unknown under the criminal laws of the Commonwealth of Massachusetts constituted the retroactive and unforeseeable application of that law in violation of his rights under the Due Process Clause of the Fourteenth Amendment.

II. Petitioner was Convicted on No Evidence that he Stored an Excessive or Illegal Quantity of Fireworks, as Alleged in the Commonwealth's Bill of Particulars, in Violation of his Rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The petitioner contends that the Commonwealth introduced no evidence from which the jury could find that he stored an excessive or illegal quantity of fireworks as was alleged in the indictments as limited by the bill of particulars. Therefore, his conviction was in violation of his rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See Douglas* v. *Buder*, *supra*, at 431-432; *Thompson* v. *Louisville*, 362 U.S. 199 (1960).

In response to petitioner's motion for a bill of particulars (S.R. 1-2, 7, 12), the Commonwealth specified the acts of the petitioner which were in reckless disregard of his alleged duty to each decedent as "[t]he storage of fireworks in excessive and illegal amounts" (S.R. 3, 8, 13). Particulars which are filed by the Commonwealth limit the scope of an indictment and require the Commonwealth to prove a defendant's guilt on the charge in the indictment in the manner set forth in the particulars. *See Commonwealth* v. *Ries*, 337 Mass. 565, 580-581 (1958).

At the conclusion of the Commonwealth's case, the petitioner moved for a directed verdict of not guilty upon each indictment and asserted in the trial court and in the Supreme Judicial Court that there was no evidence from which the jury could find beyond a reasonable doubt that the petitioner stored an excessive or an illegal quantity of fireworks. The trial judge expressly found that there was no evidence that the petitioner had violated any ordinance

or applicable regulation relating to the quantity of fireworks which could be stored (Tr. 237). At the close of all of the evidence, he so instructed the jury. Accordingly, there was no evidence that the quantity of fireworks stored was an "illegal" quantity.

There was no evidence that the quantity of fireworks stored was excessive because no evidence was introduced of a standard against which to measure the quantity of fireworks actually stored. The petitioner contended throughout the state court proceedings that evidence of such a standard could be proved in the form of statutory requirements, rules or regulations or by evidence of a custom or practice in the industry which was tied to safety standards or considerations. That there was no such evidence was found by the trial judge in ruling on the petitioner's motion at the close of the Commonwealth's case (Tr. 237) and acknowledged by the Supreme Judicial Court in its decision on petitioner's appeal. *See Commonwealth* v. *Godin*, *supra*, at 2800-2801 (*infra*, pp. 17a-18a). Accordingly, the jury was permitted to speculate whether the quantity of fireworks stores was excessive.

It is established Massachusetts law that whether the storage of a quantity of flammable products is "excessive" must be determined by reference to an applicable standard and cannot be judged by the personal knowledge of the trier of fact. In *I. Baron & Sons, Inc.* v. *Eastern Storage Industrial Park Corp.*, 355 Mass. 245 (1969), a fire of unknown origin occurred on the premises of a public warehouseman and spread to nearby premises. The plaintiff sued for damages alleging negligence due to the defendant's storage of "an excessive quantity of flammables." *Id.* at 251. The Supreme Judicial Court held that verdicts for the defendant were properly directed because there was no evidence that applicable rules and regulations of fire prevention authorities

(which established storage standards) had been violated and the trier of fact could not supply such a standard of his own knowledge. *Id.* at 251-253. In the case at bar, as in *I. Baron & Sons, Inc.*, *supra*, the petitioner was found not to be required to comply with fire safety regulations because the corporation had commenced operation prior to the effective date of such regulations. Compare *Commonwealth* v. *Godin*, *supra*, at 2791 (*infra*, pp. 9a-10a), with *I. Baron & Sons, Inc.*, *supra*, at 247-253.

In this case, the Supreme Judicial Court stated that "the knowledge of facts which would cause a reasonable man to know that a danger of serious harm exists . . . has its roots in experience, logic, and common sense, as well as in formal legal standards." *Id.* at 2801 (*infra*, p. 18a). The fact that no "formal legal standards" provided the measure of "excessive storage" here was found by the trial judge and acknowledged by the Supreme Judicial Court. The fact that "experience, logic, and common sense" cannot provide the knowledge of facts necessary to establish the standard is clear from the case of *I. Baron & Sons, Inc.*, *supra*. Accordingly, there was no evidence of a standard against which the jury could measure the petitioner's actions to determine that he stored "an excessive or illegal quantity of fireworks."

The Supreme Judicial Court's recitation of the findings which the jury properly could make does not supplant the need for proof of excessive storage, particularly since the explosive nature of fireworks renders an accident peculiarly likely even with the exercise of the highest degree of care on the part of the petitioner. *See Thompson* v. *National Fireworks Co.*, 195 Mass. 327, 329 (1907).

The absence of a standard from which the jury could conclude that the petitioner stored an excessive or illegal quantity of fireworks permitted his conviction based upon

no evidence. Such a conviction violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Douglas* v. *Buder, supra,* at 431-432; *Thompson* v. *Louisville, supra,* at 206.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts should be granted.

Respectfully submitted,

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Appendix A.

PORTIONS OF THE RECORD SHOWING THE PROPER AND TIMELY RAISING OF FEDERAL QUESTIONS.

COMMONWEALTH OF MASSACHUSETTS.

Superior Court.

COMMONWEALTH

v.

EDWARD J. GODIN

Nos. 54614, 54615, 54616.

Motion to Dismiss and for Other Appropriate Relief.

The Defendant moves that the Court dismiss the Indictment in this case or grant other appropriate relief for each of the following reasons:

1. The Indictment fails to describe any crime or offense fully and plainly, substantially and formally, as required by Article XII of the Declaration of Rights of the Constitution of the Commonwealth.

Wherefore, the Defendant requests that the Indictment be dismissed.

2. The Indictment fails to describe the crime which the Defendant is alleged to have committed with sufficient specificity so as to satisfy the requirements of the Fourteenth Amendment to the United States Constitution prohibiting the deprivation by any state of any person of liberty or property without due process of law.

Wherefore, the Defendant requests that the Indictment be dismissed.

3. The Indictment charges that Pyro Products, Inc. and the Defendant were under certain legal duties to the employees of Pyro Products, Inc. and that the Defendant acted in reckless disregard of those alleged duties. As a matter of law of the Commonwealth, however, Pyro Products, Inc. was not under legal duty to its employees as set forth in the Indictment and consequently the Defendant was under no such duty and his actions cannot be found, as a matter of law, to have been in reckless disregard of any such duty.

Wherefore, the Defendant requests that the Indictment be dismissed.

. . . . . .

Filed October 20, 1972, and denied (Ford, J.) February 13, 1973. Defendant's exception noted.

Nos. 54614, 54615, 54616.

Defendant's Motion for a Directed Verdict of Not Guilty upon the Close of the Evidence of the Commonwealth.

The Defendant moves that the Court direct a verdict of not guilty upon the close of the evidence of the Commonwealth.

By his Attorney,
MORRIS M. GOLDINGS.

Filed July 1, 1975, and denied (Brogna, J.) July 2, 1975. Defendant's exception noted.

Motion renewed at close of defendant's evidence and denied (Brogna, J.) July 2, 1975. Defendant's exception noted.

Nos. 54614, 54615, 54616.

Motion for New Trial.

Now comes the Defendant Edmund J. Godin and moves for new trial on each of the above-numbered indictments and urges as grounds therefor the following:

1. The instructions to the jury in each of the above-numbered indictments violated the rights of the Defendant under the Fifth and Fourteenth Amendments to the United States Constitution and Article XII of the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts in that the instructions deprived the Defendant of liberty and property without due process of law.

2. The instructions to the jury in each of the above-numbered indictments constituted legislation by the judicial department in violation of Article XXX of the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts.

3. The instructions to the jury in each of the above-numbered indictments constituted an ex post facto law in violation of Article I Section 10 and the Fourteenth Amendment to the United States Constitution and Article XII of the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts.

4. The verdict was against the weight of the evidence.

Filed July 15, 1975, and denied (Brogna, J.) July 31, 1975.

Nos. 54614, 54615, 54616.

Defendant's Exception to the Court's Denial of Defendant's Motion for a New Trial.

Now comes the Defendant, Edmund J. Godin, and takes exception to the denial of his Motion for a New Trial in each of the above-numbered indictments.

Filed August 4, 1975.

Nos. 54614, 54615, 54616.

Defendant's Assignment of Errors Pursuant to G.L. c. 278 §§ 33A-33H, Inclusive.

The Defendant respectfully assigns as errors with respect to each of the above-numbered Indictments the following:

1. The Superior Court justice erred in denying the Defendant's Motions To Dismiss and for Other Appropriate Relief on the grounds that: (1) the Indictments fail to describe any crime or offense fully and plainly, substantially and formally, as required by Article XII of the Declaration of Rights of the Constitution of the Commonwealth; (2) the Indictments fail to describe the crime which the Defendant is alleged to have committed with sufficient specificity so as to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution; (3) under the law of the Commonwealth, neither Pyro Products, Inc. nor the Defendant were under the legal duties to the employees of Pyro Products, Inc. which were charged in the Indictments and, therefore, as a matter of

law, the Defendant could not be found to have been in reckless disregard of any such duty.

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Defendant's Motions To Dismiss and for Other Appropriate Relief

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20. The Superior Court justice erred in denying the Defendant's Motions for Directed Verdicts of Not Guilty Upon the Close of Evidence of the Commonwealth on the grounds that: (1) there was no evidence that the Defendant breached his duty of care to the employees as alleged in the Indictments by storing an excessive or illegal quantity of fireworks; (2) the Commonwealth had introduced no evidence that the Defendant had stored an illegal or excessive quantity of fireworks as was charged in the Indictments, as limited by the particulars in the Commonwealth's Bill of Particulars.

Tr. 237, Exceptions 20, 21, 22.

Defendant's Motions for Directed Verdict of Not Guilty Upon Close of the Evidence of the Commonwealth.

. . . . . .

22. The Superior Court justice erred in denying the Defendant's Motions For Directed Verdicts of Not Guilty Upon All the Evidence on the same grounds stated in Assignment of Error No. 20.

Tr. 281, Exception 24

Defendant's Motions For Directed Verdict of Not Guilty Upon the Close of the Evidence Of the Commonwealth.

23. The Superior Court justice erred in instructing the jury that the employees were entitled to have the risks kept to a reasonable minimum, consistent with the operation of a business of the type in which the Defendant was engaged, on the grounds that: (1) such instruction deprived the Defendant of due process of law secured to him by the Fourteenth Amendment of the United States Constitution and Article XII of the Declaration of Rights of the Constitution of the Commonwealth in that there was no evidence of the risks which would be consistent with the operation of the business of the type in which the Defendant was engaged and such instruction did not set forth the standard of care by which the Defendant's conduct was to be measured as enunciated by the Courts of the Commonwealth in prior decisions: (2) such instruction did not restrict the jury to finding the Defendant guilty or not guilty of the crimes charged in the Indictments, as particularized in the Commonwealth's Bill of Particulars: (3) such instruction constituted legislation by the Judicial Department in violation of Article XXX of the Declaration of Rights of the Constitution of the Commonwealth: (4) such instruction violated Article I § 10 and the Fourteenth Amendment to the United States Constitution and Article XII of the Declaration of Rights of the Constitution of the Commonwealth.

Tr. 308, Exception unnumbered

. . . . . .

26. The Superior Court justice erred in failing to instruct the jury in accordance with the Defendant's Request for Instructions to the Jury paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, and 20 on the grounds that: (1) the failure to so instruct the jury deprived the Defendant of due process of law secured to him by the Fourteenth Amendment of the United States Constitution and Article XII of the Declaration of Rights of the Constitution of the Commonwealth; (2) the failure to so instruct the jury permitted the jury to find the Defendant guilty of crimes other than those charged in the Indictments, as particularized in the Commonwealth's Bill of Particulars; (3) the failure to so instruct the jury amounted to a declaration of new law by the Judicial Department in violation of Article XXX of the Declaration of Rights of the Constitution of the Commonwealth; (4) the failure to so instruct the jury permitted the retroactive application of new law in violation of Article I § 10 and the Fourteenth Amendment to the United States Constitution and Article XII of the Declaration of Rights of the Constitution of the Commonwealth.

Tr. 309-310, Exception unnumbered.

Defendant's Request For Instructions To Jury

27. The Superior Court justice erred in denying Defendant's Motion for a New Trial on the grounds that: (1) the Court's instructions to the jury deprived the Defendant of liberty and property without due process of law in violation of the Fourteenth Amendment to the United States Constitution and Article XII of the Declaration of Rights of the Constitution of the Commonwealth; (2) the Court's instructions to the jury constituted legislation by the Judicial

Department in violation of Article XXX of the Declaration of Rights of the Constitution of the Commonwealth; (3) the Court's instructions to the jury violated Article I § 10 and the Fourteenth Amendment to the United States Constitution and Article XII of the Declaration of Rights of the Constitution of the Commonwealth; (4) the verdict was against the weight of the evidence.

Defendant's Motion for a New Trial

Defendant's Exception to the Court's Denial of Defendant's Motion for a New Trial.

Appendix B.

SUPREME JUDICIAL COURT.

COMMONWEALTH *vs.* EDMUND J. GODIN.

LIACOS, J. On March 30, 1972, an explosion occurred in Bridgewater, Massachusetts, at a manufacturing plant housing Pyro Products, Inc., a corporation engaged in the manufacture of fireworks. As a result of that explosion, three employees of the corporation were mortally wounded. The grand jury handed down three indictments which charged that the defendant committed manslaughter by causing the deaths of the three employees. After jury verdicts against the defendant he was sentenced to concurrent terms of imprisonment in the Massachusetts Correctional Institution at Concord. A notice of appeal was filed with the Appeals Court and we granted the defendant's application for direct appellate review. We find no error.

The assignments of error which have been argued concern (1) the adequacy of the indictments charging the defendant; (2) the admission of certain evidence; (3) the judge's failure to direct verdicts in the defendant's favor; and (4) the propriety of the judge's instructions to the jury. We state the facts in the light most favorable to the Commonwealth. *Commonwealth* v. *Sandler*, 369 Mass. , (1975) [Mass. Adv. Sh. (1975) 2993, 3010].

The defendant was president of Pyro Products, Inc. The corporation was duly licensed under both the State and local laws and had all bonds and permits required by law to operate a fireworks manufacturing company. The judge below ruled the corporation did not have to comply with the fire safety regulations issued pursuant to G. L. c. 148,

§ 13, as amended through St. 1945, c. 710, §§ 5-8, as it had begun operation prior to the effective date of the statute and was, therefore, exempt from complying with its provisions.

The plant itself was a complex of some twenty-one separate buildings. Buildings two and three were the locations of the initial stages of manufacture. Building seven was the building where the insertion of fuses and other matter necessary for the fireworks to lift off was accomplished, as well as where a process known as drying took place. Building eight was for shipping, and buildings nine through eighteen were evidently storage buildings. The process of manufacture began in building two with the rolling of the tubes for the fireworks, and the processing of black powder. The "flash," which gives the fireworks their multi-colored luminescence was manufactured in building five and loaded into the tubes at building two.

Of particular import is the process which took place in building number seven, the building in which all three decedents were working at the time of the explosion. That building was used primarily for drying the completed fireworks. At the time of the accident two other functions took place therein; the finishing off of the fireworks by putting the final required wrappings around the tubes and the insertion of so-called lifting charges. Lifting charges were the power source which enabled the fireworks to reach their desired altitude for detonation. A secondary use of building seven at the time of the explosion was to store a great number of uncompleted fireworks. These uncompleted fireworks had accumulated because of a strike which forestalled completion of partially manufactured fireworks. The strike lasted from September, 1971, until the beginning of 1972.

There was evidence from which the jury could conclude that prior to the end of the strike no more than 1,000 to

There was evidence from which the jury could conclude that prior to the end of the strike no more than 1,000 to 1,500 fireworks were stored in building seven, but after the end of the strike and up to and including the time of the explosion, approximately 4,000 to 5,000 shells were stored there. There was evidence from which the jury could conclude that the storage of large numbers of unfinished shells in the building severely limited and hampered the ability of those persons involved in the manufacturing process to move about and do their job without undue difficulty. Several employees worked in building seven in proximity to completed and uncompleted shells in boxes in an area described as "congested" by the presence of such boxes. There was evidence to indicate the defendant had been warned by employees on separate occasions about the danger possibly resulting from the excess accumulation.

About 9:35 A.M., on March 30, 1972, an explosion rocked the compound. Of the employees working there at the time several were injured. Three were killed. The jury could have concluded that the explosion originated in building seven and caused other explosions and damage at nearby buildings. The dismembered bodies of the decedents were found outdoors near building seven. Photographs of the scene after the explosion, which were before the jury as part of the Commonwealth's case, depict a scene of almost total devastation.

As part of the case and over the exception of the defendant as to his qualifications, an expert witness testified for the Commonwealth that there was a hazard involved in storing the amount and weight (16,000 pounds) of fireworks stored in the building at the time of the explosion. The hazard consisted of both the increased likelihood of an accident occurring and the greater extent of probable damage which would occur in the event of an accident. While the

expert witness was unable to state an opinion as to the source of ignition, in response to a hypothetical question he did state that friction could cause the shells to ignite. He testified that the amount of damage resulting from an explosion of 16,000 pounds of fireworks would be far more extensive than would the damage resulting from an explosion of a substantially lesser amount; namely, that such an explosion probably would completely level the building in which the fireworks were stored. Also, the expert testified that such an explosion would cause secondary damage to any adjacent buildings, and, should there be combustible materials in those other buildings, those materials would be susceptible to ignition by the blast.

This was the sum of the evidence viewed most favorably to the Commonwealth. We consider the defendant's claims of error.

1. *Sufficiency of the Indictments.*

The defendant challenges the sufficiency of the indictments on two grounds. First, he argues that their material allegations fail to set forth a crime under the law of Massachusetts as it was on the day of the explosion. Second, he argues that the indictments do not "plainly and fully, substantially and formally" describe the crime as required by both art. 12 of the Declaration of Rights of the Massachusetts Constitution and the Fourteenth Amendment to the Constitution of the United States.

a. The indictments alleged to contain these fatal flaws state in each instance in material part that Pyro Products, Inc., "was under a legal duty to its employees to use reasonable care to keep its premises safe for their use in their employment"; that the defendant "was . . . authorized by the corporation to maintain, control, operate, construct, alter, supervise and manage its premises"; that he "accepted the

responsibility for such acts," and "was therefore under a duty to its employees to use such reasonable care," but "in reckless disregard of such duty" to each decedent employee and in "reckless disregard of the probable harmful consequences" to such employee "of his failure to perform said duty," he "did wilfully, wantonly and recklessly neglect and fail to fulfil" his duty to each of the three decedents and as a result "did assault and beat said [decedent] and by such assault and beating did kill said [decedent]."

The defendant's primary argument in respect to the alleged insufficiency of the indictments is that no decision of this court up to the time of the explosion set forth, in respect to criminal law, the rule that an employer owed his employees a duty of reasonable care in the operation and maintainance of the place of employment. Consequently, it is claimed the indictments do not set forth the crime of manslaughter.

Both parties to this appeal recognize the landmark case respecting the determination of this and other related issues to be *Commonwealth* v. *Welansky*, 316 Mass. 383 (1944). That case involved the tragic fire at the Cocoanut Grove nightclub in Boston in 1942. The defendant, the president and dominant figure of the corporation which owned the club, was indicted for the crime of manslaughter, based on material allegations closely resembling those in the case at bar. The defendant concedes this similarity but points to one difference that he alleges is crucial. Whereas the indictments in this case alleged that the defendant owed a duty of reasonable care to an employee, the indictments in *Welansky* alleged the existence of that duty in respect to invitees. Moreover, the defendant points to a footnote in *Welansky* at 397 set forth in the margin,[1] which suggests no

[1] "Compare the case of an employer who at common law owes no duty to his employees to make his factory safer than it appeared to be

such duty is owed to employees. The defendant argues that the standard set forth in the *Welansky* footnote states the law applicable in 1972. He claims that since the standard differs from that set forth in the indictments, the difference is fatal to their legal sufficiency.

There is no statutory definition of manslaughter. The elements of the crime are derived from the common law. *Commonwealth* v. *Webster*, 5 Cush. 295, 303 (1850). The common law development in the area has resulted in the definition of two distinct forms of manslaughter. So-called voluntary manslaughter, see *Commonwealth* v. *Soaris*, 275 Mass. 291, 299 (1931), is a form of manslaughter clearly not implicated in the instant case and it need not be discussed. Involuntary manslaughter is "an unlawful homicide unintentionally caused by an act which constitutes such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct." *Commonwealth* v. *Vanderpool*, 367 Mass. 743, 747 (1975) [Mass. Adv. Sh. (1975) 1543, 1548]. See *Commonwealth* v. *Campbell*, 352 Mass. 387, 397 (1967). The Commonwealth has an interest that persons within its territory should not be killed by the wanton and reckless conduct of others. *Commonwealth* v. *Atencio*, 345 Mass. 627, 629 (1963). The interests sought to be protected are readily distinguishable from the interests protected by the imposition of legal duties and the standards

when the employment began, because they contractually assumed the risk. *Jones* v. *Granite Mills*, 126 Mass. 84 [1878]. *Keith* v. *Granite Mills* 126 Mass. 90 [1878]. *Pauley* v. *Steam Gauge & Lantern Co.* 131 N. Y. 90 [1892]. *Huda* v. *American Glucose Co.* 154 N. Y. 474 [1897]. In those cases recovery by a servant against his master for injury caused by fire in a factory was denied. See also *Wainwright* v. *Jackson*, 291 Mass. 100 [1935]; *Little* v. *Lynn & Marblehead Real Estate Co.* 301 Mass. 156 [1938]. In *Cloutier* v. *Oakland Park Amusement Co.* 129 Maine 454 [1930], the court failed to distinguish between such cases and the case of an invited business visitor."

for determining their breach which have shaped the law of civil liability.[1] The fact that a particular allegation of facts may be nonactionable in tort does not perforce mean the same holds true when those same facts are contained in the material allegations of an indictment for manslaughter.

It is on this point that the defendant's argument has its downfall. The dictum in *Welansky* which the defendant seeks to give the force of law was based on notions of contract and assumption of the risk aimed at determining who shall bear the risk of loss in a particular circumstance. W. Prosser, Torts § 68 (4th ed. 1971). Doctrines such as contractual assumption of risk have no place in the criminal law. See *Commonwealth* v. *Atencio*, *supra*. It follows, therefore, that the language in *Welansky* relied on by the defendant must be viewed as obiter dictum with no force of precedent.

An employer whose acts or omissions constitute a disregard for the probable harmful consequences and loss of life as to amount to wanton or reckless conduct is properly charged with manslaughter where a foreseeable death is caused thereby. The *Welansky* case settled any claim that "negligence" and "wanton" and "reckless" conduct were words expressing differences of degree of risk. The differences involved are differences in kind. The interests involved are distinct. The State is the offended party where

[1] The development of tort law in this Commonwealth is exemplified by a number of recent decisions. See *Mounsey* v. *Ellard*, 363 Mass. 693 (1973) (rejecting different standards of care as between licensees and invitees); *Lindsey* v. *Massios*, Mass. (1977) (Mass. Adv. Sh. [1977] 381) (tenant's visitors in common passageways); *King* v. *G & M Realty Corp.*, Mass. (1977) (Mass. Adv. Sh. [1977] 2372) (tenants in common passageways). See also *Bouchard* v. *DeGagne*, 368 Mass. 45 (1975) (Mass. Adv. Sh. [1975] 1856) (*Mounsey* doctrine to be applied retroactively). Under the view we take (as did the trial judge) these decisions are not relevant to the issues involved here because of the different interests involved in the criminal law.

a death is caused by recklessness. To accept the defendant's arguments here is not only to overlook the fundamentally different purposes of criminal law and tort law but to create a class of persons — employees — as to whom a license to kill by wanton and reckless conduct is given. No such right has ever existed, nor do we accept such a view now. The indictments were legally sufficient.

b. Much of what we have said in regard to the legal sufficiency of the indictments is relevant to the defendant's claim that the indictments did not contain the specificity required by art. 12 of the Massachusetts Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

The defendant concedes that the indictments in this case track, with the exception previously noted, the indictments in *Welansky*. A claim of lack of specificity similar to this one was also made in that case and was rejected. The reasons set forth for the rejection of the defendant's claim in *Welansky*, i.e., that the indictment stated the elements required by the statutes relative to such indictment, G. L. c. 277, § 79, and were fully supported by particulars, G. L. c. 277, § 40, as well as the absence of any claim of prejudice, are equally applicable here. *Commonwealth* v. *Welansky, supra*, at 393-396. Cf. *Commonwealth* v. *Baker*, 367 Mass. 58 (1975) [Mass. Adv. Sh. (1975) 1875]. It therefore follows that the defendant's claim is without merit.

2. *Failure to Grant Directed Verdicts.*

The defendant moved for directed verdicts of not guilty at the close of the Commonwealth's case and again at the close of all the evidence. His motions were denied. The defendant argues that the trial judge was in error in failing to grant his motions on three grounds: (1) that there was no evidence that he caused to be stored an excessive quantity of

fireworks; (2) that, as matter of law, he did not engage in wanton and reckless conduct; and (3) that there was no evidence, assuming adequate proof of excessive storage, that the excessive storage was the cause of the deaths.[3]

The first two grounds asserted rely in large part on the absence of any evidence that the quantity of fireworks stored violated any applicable statute, rule, regulation or custom and usage. To a large extent the defendant's argument misapprehends the nature of the standard which would establish the criminal liability of the defendant.

"The essence of wanton or reckless conduct is intentional conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another. . . . [Citations omitted.] Wanton or reckless conduct amounts to what has been variously described as indifference to or disregard of probable consequences." *Commonwealth* v. *Welansky, supra* at 399. See also *Banks* v. *Braman*, 188 Mass. 367 (1905).

The Commonwealth's theory of the case, as set forth in its bill of particulars and at trial was that the "storage of fireworks in excessive and illegal amounts" constituted the defendant's "wanton and reckless conduct." The essence of the particular, fairly read, is that by allowing the level of fireworks to accumulate to the extent it did, the defendant

[3] The defendant also asserts that the judge applied an erroneous standard of review. However, if there was, as we conclude, sufficient evidence to go to the jury, then any such alleged error was harmless. We consider on this issue only the evidence introduced up to the time the Commonwealth rested its case and the defendant filed his motions for directed verdicts. *Commonwealth* v. *Kelley*, Mass. , - (1976) (Mass. Adv. Sh. [1976] 1023, 1026-1027). The view we take of the evidence is that most favorable to the Commonwealth. *Commonwealth* v. *Klein*, Mass. (1977) (Mass. Adv. Sh. [1977] 1393).

created a risk of potential harm of such a degree and magnitude as to constitute wanton and reckless conduct.

That there was no evidence that the accumulation in the amounts alleged violated a particular statute, rule or regulation is of no more consequence than it was in *Welansky*. At best the violation of such standards would be evidence of negligence, *Richmond* v. *Warren Inst. for Savings*, 307 Mass. 483 (1940), a standard different in kind from wanton and reckless conduct. *Commonwealth* v. *Edelin*, Mass. (1976) [Mass. Adv. Sh. (1976) 2795]. The standard necessary for a conviction is at once both a subjective and objective standard, and is based in part on the knowledge of facts which would cause a reasonable man to know that a danger of serious harm exists. Such knowledge has its roots in experience, logic, and common sense, as well as in formal legal standards.

In this case there was evidence from which the jury could conclude that (1) prior to the explosion the amount of fireworks stored in building seven had reached unprecedented levels; (2) the defendant had been warned of the dangers posed by such accumulations; (3) nothing was done to remedy the situation; and (4) increments in such storage increased the risk of explosion and resulting harm in a proportion commensurate with the extent of increase in storage.

Such evidence, if believed, would warrant the jury in concluding that the defendant should have been aware and indeed was aware of the increased risk of harm and thus his failure to remedy the situation was the kind of conduct which constitutes wanton and reckless conduct. It certainly could not be said that such conduct was not reckless as matter of law. Recklessness involves conscious creation of a substantial and unjustifiable risk. See Model Penal Code § 2.02 (c) (Proposed Official Draft 1962); Comments, § 2.02 at 123-125 (Tent. Draft No. 4, 1955). As long as there is

proof that the defendant's conduct was reckless as far as the risk of explosion was concerned, he must then be held accountable for the probable consequences of such conduct.

It therefore follows that the motions for the directed verdicts were properly denied.

3. *The Charge.*

The defendant assigned as error both the judge's giving of certain instructions and his failure to grant certain of the defendant's requests for instructions. The substantive basis on which the assignments are premised is twofold: (1) that the charge did not adequately define wanton and reckless conduct and (2) that it did not reflect the state of the common law as of the time of the crime. The second line of argument has been previously discussed and we need not repeat our discussion here.

The charge to the jury is to be viewed in light of the overall impact it has on the jury. *Commonwealth* v. *Pinnick*, 354 Mass. 13, 15 (1968). A judge need not instruct the jury in exact accord with the defendant's request. *Commonwealth* v. *Lussier*, 333 Mass. 83, 93 (1955). The defendant is only entitled to have the issues of fact clearly presented and the law applicable thereto properly explained. *Commonwealth* v. *Kelly*, 359 Mass. 77, 93 (1971).

The specific objections viewed in light of this standard can be easily set forth: (a) The defendant claims that the instructions were inadequate in failing to distinguish reckless and wanton conduct from negligence and gross negligence. *Welansky* requires that such a distinction be made. See *Banks* v. *Braman, supra*. However, our reading of the charge shows that the judge was careful to emphasize that the conduct for which liability might be imposed in this case must be wilful conduct, as distinguished from negligence. There was no error.

(b) The defendant also argues that the charge of reckless and wanton conduct did not set forth an adequate standard by which the jury could judge the defendant's conduct. Much of the language complained of is taken directly from instructions which were approved by this court in *Welansky*. The defendant has, however, pointed to portions of the charge which viewed in isolation arguably may be read to set a lesser standard. Viewed in the context of the entire charge wherein the judge emphasized the fact that the defendant had to be charged with knowingly accepting a high degree of risk of substantial harm we do not believe that such language was prejudicial to the defendant. *Commonwealth* v. *Kelly, supra.*

4. *Evidentiary Points.*

The defendant has argued that the judge committed reversible error by three rulings on the admission of evidence. We consider his arguments briefly.

(a) The defendant argues that the testimony of the Commonwealth's expert should have been excluded as he received some of his training from his father, who had worked at Pyro Products, Inc. The expert, himself, had never worked for the corporation. Such matters go to the credibility of the witness and are for the jury and not the judge to determine. *Muzi* v. *Commonwealth,* 335 Mass. 101 (1956).

(b) The defendant challenges the admission of testimony as to the condition of the bodies of the decedents soon after the explosion. Our reading of the transcript does not allow us to say that the judge abused his discretion in admitting such evidence. Compare *Commonwealth* v. *Lamoureux,* 348 Mass. 390, 393 (1965), with *Commonwealth* v. *Richmond,* Mass. (1976) [Mass. Adv. Sh. (1976) 2873].

(c) The defendant also argues that it was error to admit testimony as to manufacturing procedures used at Pyro Products, Inc., at times other than the commencement of the work of each of the decedents or at the time of the explosion. So much of the objection as hinges on the defendant's understanding of the applicable law is, of course, without merit. The evidence was relevant so that the jury could judge the extent of the risk accepted by the defendant in allowing the extent of accumulation which took place.

The witness was also subject to vigorous cross-examination thereby affording the defendant the opportunity to alleviate any possible prejudice. There was no error.

5. From what we have said it follows that justice does not require the granting of a new trial.

Judgments affirmed.

Appendix C.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
AT BOSTON, DECEMBER 29, 1977.

IN THE CASE No. SJC-734

COMMONWEALTH

vs.

EDMUND J. GODIN

pending in the Superior Court for the County of Plymouth
Nos. 54614, 54615, 54616

ORDERED, that the following entry be made in the docket; viz., —

Judgments affirmed.

BY THE COURT,

WILLIAM M. CLORAN,
Assistant Clerk.

December 28, 1977

Supreme Court, U. S.
FILED
APR 27 1978
MICHAEL RODAK, JR., CLE

In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1379.

EDMUND J. GODIN,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief of the Respondent in Opposition.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1379.

EDMUND J. GODIN,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief of the Respondent in Opposition.

Respondent is not dissatisfied with petitioner's citation of the opinion below or his statement of jurisdiction.

Questions Presented.

1. Whether the Massachusetts Supreme Judicial Court enunciated a new doctrine when it rejected the petitioner's claim that the common law exception to tort liability known as "contractual assumption of the risk" applies to criminal prosecutions.

2. Whether, if so, the new doctrine was so unforeseeable as to deprive employers of fair warning that recklessly killing their employees constitutes a crime.

3. Whether, if so, the petitioner has standing to challenge this new doctrine.

4. Whether there was sufficient evidence of reckless conduct by the petitioner to withstand constitutional challenge.

Reasons for Denying the Writ.

I. The Claim of Lack of Notice does Not Merit the Attention of This Court.

The petitioner was convicted of three counts of involuntary manslaughter following a devastating explosion at a fireworks factory which he controlled. He does not question the well-established Massachusetts rule that reckless or wanton conduct will support a manslaughter conviction, but says that this rule does not apply to him because the decedents were employees of his corporation. The Supreme Judicial Court opinion rejecting this argument he characterizes as "a retroactive and unforeseeable application of the criminal law" (Pet. for Cert., p. 2). This characterization is inaccurate.

There is no case in Massachusetts holding that the common law tort doctrine known as "contractual assumption of the risk" is applicable to criminal cases. So far as the respondent is aware, there is no decision anywhere so holding. Consequently, the Supreme Judicial Court rejected the petitioner's argument and held that Massachusetts had never engrafted this tort-law exception upon the general law of manslaughter:

> "To accept the defendant's arguments here is not only to overlook the fundamentally different purposes of criminal law and tort law but to create a class of persons — employees — as to whom a license to kill by wanton and reckless conduct is given. No such right has ever existed, nor do we accept such a view now." (Pet. for Cert., p. 16a.)

Thus, the general rule applicable to all persons applies equally to the petitioner. Reckless or wanton conduct which causes death constitutes manslaughter. This ancient and universal rule provided the petitioner with fair notice by which his conduct might be governed. Nevertheless, he says that he was justified in disregarding this notice by a remark made in a footnote in a landmark Massachusetts case. In *Commonwealth* v. *Welansky*, 316 Mass. 383 (1944), the court reviewed manslaughter convictions arising out of the infamous Cocoanut Grove nightclub fire. At page 397, the court noted:

> "Usually wanton or reckless conduct consists of an affirmative act, like driving an automobile or discharging a firearm, in disregard of probable harmful consequences to another. But where, as in the present

> case, there is a duty of care for the safety of business visitors invited to premises which the defendant controls,* wanton or reckless conduct may consist of intentional failure to take such care in disregard of the probable harmful consequences to them or of their right to care."

At the point marked with the asterisk, the court appended the footnote cited by the petitioner:

> "Compare the case of an employer who at common law owes no duty to his employees to make his factory safer than it appeared to be when the employment began, because they contractually assume the risk. [Citations omitted.] In those cases recovery by a servant against his master for injury caused by fire in a factory was denied. [Citations omitted.] In *Cloutier* v. *Oakland Park Amusement Co.*, 129 Maine, 454, the court failed to distinguish between such cases and the case of an invited business visitor." 316 Mass. at 397 n. 2.

The Supreme Judicial Court might have disposed of the petitioner's contention in a number of ways. First, it might have noted that the *Welansky* footnote applied only to omissions to act, since the court had disposed of affirmative acts in the preceding sentence. This would eliminate any problem, since the conduct charged to the petitioner consisted of affirmative acts — in particular, of storing 16,000 pounds of explosive fireworks in a dangerous manner.

Secondly, the court might have observed that the petitioner was not the decedents' employer. He was the president of the corporation that employed them, but there

is no question that a fellow employee of a business entity can be charged with manslaughter. See *Regina* v. *Haines*, 2 Car. & Kir. 368 (Worc. Ass. 1847).

The court chose, however, to face the petitioner's argument squarely and to declare that the proposition that he advanced has never been the law of Massachusetts. In doing so, it observed that the *Welansky* footnote is clearly dictum. The footnote is unnecessary to a decision of the question then before the court, and is introduced by language which belies the creation of a binding precedent. The reader is invited to "compare" a rule applicable in another context, but there is no suggestion that this rule is to be made applicable to manslaughter charges. The court's remark cannot be taken to create an unprecedented and logically indefensible exception to the general rule on reckless conduct.

It is the fact that petitioner relies on an exception to the general rule which distinguishes his case from those upon which he relies. In *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), and *Douglas* v. *Buder*, 412 U.S. 430 (1973), the lower court had enlarged the impact of a statute and a court order beyond the ordinary meaning of the words used. In the present case, the Supreme Judicial Court has done the exact opposite. It refused to import an extraordinary meaning to ordinary words. The petitioner's ill-founded hope that it would do so does not entitle him to relief.

II. The Sufficiency of the Evidence.

The question of constitutional sufficiency of the evidence is normally best left to the lower courts. If the petitioner believes that there was a failure of evidence in a constitu-

tional sense, he should present his claim to a federal habeas court, which would be better able to review the evidence and evaluate his claim. For this reason alone, his petition should be denied. It is unlikely that any question of national significance will be answered by reviewing the evidence in this case.

In any event, there was abundant evidence to meet the constitutional standard. The petitioner ordered that approximately 16,000 pounds of explosives be stored in a building in which little or none was normally stored and in which only much smaller amounts were normally kept while undergoing processing. He ordered that several employees work in this building, although he had been warned of the danger of doing so. There was expert testimony that the excess quantity of fireworks not only increased the risk of explosion, but also increased the severity of any explosion which might occur. The actual explosion was devastating; it destroyed not only the building in which the excessive storage took place, but also other nearby buildings and vehicles in which fireworks were stored. All of the employees working in the building in which the extensive storage took place were able to get out, but three of them were killed by explosions and fire before they could reach safety. There is no occasion for the Court to review this evidence.

Conclusion.

The petition should be denied.

Respectfully submitted,

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